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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH LOYA,

Defendant and Appellant.

D075235

(Super. Ct. No. SCD277109)

APPEAL from a judgment of the Superior Court of San Diego County, Robert F. O'Neill, Judge. Affirmed.

Kenneth J. Vendevelde, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Daniel Rogers and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Joseph Loya of carrying a dirk or dagger (Pen. Code, § 21310). The court sentenced Loya to the upper term of three years in prison.

Loya appeals, contending the court should have held a hearing under *People v. Marsden* (1970) 2 Cal.3d 118, after the verdict was read, to determine whether Loya was seeking to replace his appointed counsel. Loya did not specifically ask to replace counsel, nor did he request any form of hearing. He did make two remarks very shortly after the guilty verdict had been read. At one-point Loya said: "I want to waive my public defender." Thereafter, when his counsel was talking to the court, Loya could not hear her. He noted counsel was "whispering" and said: "I require better assistance." Nobody followed up on those comments, and the record does not contain any further explanation of the two remarks.

Loya contends the remarks were sufficient to raise the question of whether Loya was seeking to replace appointed counsel, and thus, the court was required to conduct a "*Marsden* hearing" to inquire if Loya had complaints about counsel and was seeking her replacement.

As we will discuss below, there is nothing in the comments themselves or in the procedural context in which they were made that would reasonably put the trial judge on notice that Loya was seeking to replace his appointed counsel. Thus, we will find the court had no sua sponte duty to hold a *Marsden* hearing.

STATEMENT OF FACTS

The facts of the underlying offense are not relevant to the issue raised in this appeal. We therefore provide a very brief summary.¹

Around midnight on the night of his arrest, Loya got into a confrontation with two security guards outside a nightclub in downtown San Diego. The guards asked Loya to leave but he refused. When one of the guards approached, Loya pulled a knife from his clothing and made threatening gestures with it. When police arrested Loya moments later they found a knife in his waistband.

DISCUSSION

This case illustrates the limits of appellate review based only on the printed record. We do not know the physical location of the parties or the tone or volume of the various voices. It is therefore difficult to know exactly the circumstances that existed when the two stray remarks were made in this case. We do know the words that were spoken, and we know that there was no further discussion of the meaning of the remarks. The question we must answer is whether the remarks by themselves were sufficiently clear to put the trial court on notice that Loya might have wanted to replace appointed counsel. When we evaluate the comments, considering the remarks that preceded and followed the two specific comments, we conclude the court was not put on notice of the need to comply with the *Marsden* rule. We quote from the transcript to provide such context as is possible from a cold and limited record:

¹ Loya does not challenge the admissibility or sufficiency of the evidence to support his conviction.

"As to the trailing misdemeanor case, the Court will formally revoke probation in that case, set it for sentencing after revocation. That case number is M236474.

"THE DEFENDANT: Objection, your Honor.

"THE COURT: He has a right to be sentenced in the statutory period.

"Does he waive that right so he can be sentenced?

"THE DEFENDANT: I want to waive my Public Defender.

"THE COURT: Does he waive that right so he can be sentenced at the same time as the felony case?

"MS. SHIMIZU: Is that for the misdemeanor, your Honor?

"THE COURT: I can't hear you.

"MS. SHIMIZU: Is that for the misdemeanor, your Honor?

"THE COURT: Yes.

"THE DEFENDANT: She's whispering again, your Honor. I require better assistance.

"THE COURT: Counsel.

"THE DEFENDANT: I can't hear.

"MS. SHIMIZU: Your Honor, he's not willing to waive time to sentencing on the misdemeanor."

A. Legal Principles

When a defendant notifies the court that the person wants to replace appointed counsel, the trial court is obligated to conduct a hearing at which the defendant can provide reasons for such request. (*People v. Marsden, supra*, 2 Cal.3d at p. 123; *People v. Lucky* (1988) 45 Cal.3d 259, 281.) However, the defendant is not required to

make a formal motion in order to invoke the *Marsden* procedure. The defendant must at least provide some clear indication that the person wishes to replace counsel. (*People v. Sanchez* (2011) 53 Cal.4th 80, 84; *People v. Molina* (1977) 74 Cal.App.3d 544, 549.)

Mere expressions of dissatisfaction with counsel does not necessarily require a court to stop the proceedings and conduct a *Marsden* hearing. (*People v. Mendoza* (2000) 24 Cal.4th 130, 157, superseded on other grounds in *People v. Brooks* (2017) 3 Cal.5th 1, 62-63.) For example, remarks that hint at the desire to relieve counsel to engage in self-representation do not trigger the *Marsden* process. (*Id.* at p. 157.)

B. Analysis

The two isolated remarks upon which Loya relies occurred a few minutes after the reading of the verdict. The discussion preceding the first remark related to time waivers for sentencing in the present case as well as a trailing misdemeanor case. Loya conferred with counsel and declined to waive time in the felony case. When his probation was revoked in the trailing case, Loya objected on unspecified grounds. That objection is not pursued on appeal.

The court inquired of counsel whether Loya would waive time for sentencing on the misdemeanor. At that point, Loya made the cryptic remark that he wanted to waive his public defender, whatever that meant. In any event, nothing further was said about "waiving" the public defender. The court and counsel continued the discussion of scheduling, and at one point, the court could not hear counsel. That is when Loya interjected the comment that counsel was "whispering again" and that he required "better assistance." Loya next complained he could not hear.

The record clearly establishes there was no specific request to replace counsel. Indeed, nothing was said about replacement. All we have in the record are two stray remarks, which were never clarified or followed up. The second remark came as counsel was apparently speaking softly. The court could not hear her, and Loya complained she was whispering and that he required better assistance. He then repeated that he could not hear. So, what would the trial judge reasonably think Loya meant? It could be he needed counsel to speak up, although it would be speculation to even assume that is what he meant about better assistance. Whatever the isolated statement might have meant, it cannot reasonably be said to indicate Loya wished to replace counsel.

Finally, we consider the comment about "waiving" the public defender. What did that comment mean? It could be an off-hand thought about self-representation or it could have been a sarcastic remark Loya interjected during the discussion by the court and counsel concerning time waivers. Loya had already voiced his objection to the probation revocation for the misdemeanor case. Whatever the remark might have meant, it was not sufficiently clear to put the trial judge on notice that a *Marsden* hearing would be needed. (*People v. Sanchez, supra*, 53 Cal.4th at p. 84.)

Trial judges must be alert to conflicts between defendants and their appointed counsel; however, trial judges are not mind readers and cannot be expected to stop the proceedings every time a represented defendant makes some outburst or stray comment. The duty to hold a *Marsden* hearing only arises when the court should know that the defendant is seeking to replace appointed counsel. The comments we have discussed in

this case were not enough to reasonably alert the trial judge of a possible desire to change counsel.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.